Champion Rivet Company, a Division of Hogen Industries, Inc., a HI TecMetal Group Company *and* Local Union No. 743 of the International Union of Allied Industrial Workers of America, AFL–CIO. Case 8–CA–24268

September 13, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On February 16, 1994, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] and to adopt the recommended Order as modified and set forth in full below.

1. The parties stipulated that the Respondent, Champion Rivet Company, a Division of Hogen Industries, Inc., a HI TecMetal Group Company, is a business successor to Champion Commercial Industries, Inc. (CCI) pursuant to *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Based on this stipulation, the judge found that these entities are a single employer within the meaning of the Act. The Respondent has excepted to the single employer finding. We find merit in this exception, and we agree with the Respondent that a stipulation as to successorship does not automatically lead to a finding of single employer. However, in its brief the Respondent has conceded that Champion Rivet Company and Hogen Industries, Inc. are a single employer. Accordingly, we limit our finding of single employer status to these two entities. This limitation does not affect the result in this case.

2. The judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Donald Chadwick, Frank Gallardo, and John Abron because of their union activities and because of the Respondent's desire to remain nonunion. In its exceptions, the Respondent argues that the General Counsel failed to show that its decision not to hire the three employees was in any way motivated by a desire to avoid the Union. The Respondent further asserts that even if the General Counsel made a prima facie showing of discrimination, the Respondent has rebutted it and demonstrated that its hiring decisions were based solely on legitimate business considerations. For the reasons set forth below, we find no merit in the Respondent's exceptions.

In cases such as this one alleging a violation of Section 8(a)(3), the Board applies the causation test enunciated in *Wright Line*,[5] and requires the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision. Once this is established, the burden shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The judge found, and we agree, that the General Counsel established a prima facie case that the Respondent's failure to hire Chadwick, Gallardo, and Abron was unlawful. Chadwick, Gallardo, and Abron were the three most senior employees of the predecessor employer (CCI) and were active union proponents.[6] Chadwick had worked there for 29 years and had been union president for at least 23 of those years.[7] Gallardo, who started in the rivet division of CCI in 1962 before transferring to manufacturing in 1963, was union steward from 1970 to 1976. Abron, who had worked for CCI since 1973, was the Union's secretary-treasurer for the last 3 years of his employ-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to the judge's ruling which required that the Respondent's counsel return the affidavits of the General Counsel's witnesses upon the conclusion of the testimony of the individual and not retain them until the close of the hearing. Although the Respondent argues generally that this impacted on its ability to establish that the General Counsel's witnesses were not credible or to support the credibility of the Respondent's witnesses, we find that the Respondent has failed to show specifically how it was prejudiced by the judge's ruling. We therefore affirm the judge's ruling.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We disavow the judge's gratuitous remarks in fn. 5 of his decision.

[5] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] The Respondent contends that all five hourly employees it hired were union members including two who had held union positions. We note, however, that the union activity of the other two employees who held union positions appears to have been minimal. Thus, Clayton Frazier testified that he had once been a department steward for a short period of time. Chadwick testified that at one time he had asked McArthur Bishop to assist him as a steward, although Bishop was never actually elected because of the short time involved. Also, according to Chadwick, Bishop stated that he did not ''give a damn about this Union.''

[7] Exhibits in the record include a letter of recommendation from D.J. Crysler, vice president of manufacturing for CCI, attesting to Chadwick's ability in handling equipment, his near-perfect attendance, his fair and honest work as a union representative, and his willingness to help his fellow employees.

ment and had also served as steward and committeeman.

Two former CCI supervisors played key roles in the Respondent's hiring process. Janos Szigeti, the Respondent's general operations manager, testified that he knew that Chadwick was the union president. Foreman Richard Huffman testified that he knew that Chadwick was the union president and that Abron held some union office.

The Respondent's union animus was demonstrated by the credited testimony that Terry Profughi, president of HI TecMetal Group Company, told Union President Chadwick during a meeting in November 1990 that he did not want to have a union in any of his plants. Specifically, Profughi stated that he owned 12 plants and all of them were nonunion, that he wanted to be able to move employees around from plant to plant but could not do this if there was a union in the plant he was purchasing, and that the purchase of CCI's induction plant would be easier if there were no union. The Respondent further demonstrated its animus by its refusal to allow Union President Chadwick to speak to Profughi at the August 1991 meeting where it was announced that the rivet division would cease operation, by its admission that General Operations Manager Szigeti initiated and assisted in the circulation of an October 1991 antiunion petition, and by its admitted unlawful refusal to recognize and bargain with the Union.

Most significantly, the General Counsel has shown that the Respondent treated Chadwick, Gallardo, and Abron differently from all other CCI unit employees. When the Respondent took over the rivet operation, it invited all the former CCI employees except Chadwick, Gallardo, and Abron to a secret meeting to apply for employment. Job applications were taken from no other sources. Five of the six applicants were hired; one former CCI employee failed his physical and was not hired. After operations commenced, the Respondent hired additional employees, but again did not contact Chadwick, Gallardo, or Abron.

Based on the foregoing, we find that an inference is warranted that the Respondent refused to hire Chadwick, Gallardo, and Abron because of their union activities and because of its desire to avoid a union in the plant. Accordingly, the burden shifts to the Respondent to demonstrate that it would not have hired Chadwick, Gallardo, and Abron even in the absence of their union activity. For the following reasons, we find that the Respondent's proffered reasons for failing to hire these employees were pretextual. The effect of a pretext finding is to leave intact the discriminatory motive established by the General Counsel. See, e.g., *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

First, the judge discredited the testimony of General Operations Manager Szigeti regarding his reasons for not hiring Chadwick, Gallardo, and Abron. That adverse credibility resolution in itself seriously, if not entirely, undermines the Respondent's *Wright Line* defense.

Although the Respondent vigorously excepts to the judge's credibility determination, we find, as stated in footnote 3, supra, no basis for reversing the finding. Indeed, the judge properly found that Szigeti gave shifting reasons for not hiring Chadwick, Gallardo, and Abron. Initially, Szigeti affirmed statements in his affidavit that the three employees were not hired because they lacked the necessary qualifications. Later in his testimony, however, Szigeti shifted to an entirely different rationale: he stated that the three employees were not hired because they were poor workers, i.e., they lacked a ''work ethic,'' were slow, or slept on the job.

Szigeti was then questioned on cross-examination as to why he did not discipline these employees for their alleged poor job performance. In testimony the judge refused to believe, Szigeti stated that he was not familiar with CCI's disciplinary procedures, even though he supervised production for CCI. Szigeti also testified that he had approached CCI President Vince Botta to complain about Gallardo and Chadwick only to be told by Botta that Gallardo and Chadwick worked for Botta and could not be fired by Szigeti. Again, the judge was warranted in discrediting Szigeti. The Respondent did not call Botta to corroborate Szigeti's testimony that Szigeti had tried to discipline Chadwick and Gallardo but that Botta would not allow it, and the judge drew an adverse inference from the Respondent's failure to call Botta to testify.[8] In addition, no personnel data or other records were submitted to corroborate Szigeti's testimony that the three employees were not employed in the rivet division.

Second, Foreman Huffman offered only conclusory testimony that the three employees were not qualified for the available positions. Therefore, the judge properly accorded little weight to Huffman's testimony. In addition, Huffman failed to corroborate Szigeti's testi-

[8] The Respondent has excepted to the judge's drawing an adverse inference from the Respondent's failure to call Botta, who was outside the hearing room, to corroborate Szigeti's testimony. The Respondent in its brief admits that Botta had an employment relationship with the Respondent. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. It may be inferred that the witness, if called, would have testified adversely to the party on that issue. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). In light of Botta's employment relationship with the Respondent, he may reasonably be assumed to be favorably disposed to the Respondent. Accordingly, we find that the judge's inference is permissible under Board law.

mony concerning the employees' poor job performance.

Finally, the record shows that after the commencement of operations, the Respondent needed and hired additional workers. Some of these employees were hired solely to perform tasks that the three alleged discriminatees were clearly qualified to perform. The Respondent failed to offer any credible explanation for failing to contact Chadwick, Gallardo, and Abron for these subsequent openings.

Accordingly, for all these reasons we find that the Respondent has failed to demonstrate that it would not have hired Chadwick, Gallardo, and Abron even in the absence of their union activity. We therefore agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the three employees.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 1.

''1. The Respondent, a successor to Champion Commercial Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.''

2. Add the following as Conclusion of Law 2 and renumber the subsequent paragraphs.

''2. Champion Rivet Company and Hogen Industries, Inc. constitute a single employer within the meaning of the Act.''

AMENDED REMEDY

The General Counsel has excepted to the judge's failure to provide an affirmative remedy for the Respondent's failure to recognize the Union and bargain in good faith. We find merit in this exception. We shall modify the judge's recommended Order to provide this affirmative remedy and to include the traditional language for the Board's reinstatement and expunction remedy. We shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Champion Rivet Company, a Division of Hogen Industries, Inc., a HI TecMetal Group Company, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Local Union No. 743 of the International Union of Allied Industrial Workers of America, AFL–CIO (the Union) as the exclusive representative of its employees in the appropriate unit described below.

(b) Circulating petitions designed to have its employees disassociate themselves from the Union.

(c) Refusing to hire employees because of their union activities and because of its desire to operate a nonunion facility.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if any understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees and truck drivers of the Employer's Cleveland, Ohio operations, excluding office clerical employees, and professional employees, guards and supervisors as defined in the Act.

(b) Offer Donald Chadwick, Frank Gallardo, and John Abron immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its files any reference to the unlawful refusals to hire and notify the employees in writing that this has been done and that the refusals to hire will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Cleveland, Ohio facility copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Local Union No. 743 of the International Union of Allied Industrial Workers of America, AFL–CIO.

WE WILL NOT circulate petitions among our employees for them to disassociate themselves from the Union.

WE WILL NOT refuse to hire employees because of their union activities or because of our desire to operate a nonunion facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees and truck drivers of the Employer's Cleveland, Ohio operations, excluding office clerical employees, and professional employees, guards and supervisors as defined in the Act.

WE WILL offer Donald Chadwick, Frank Gallardo, and John Abron immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL notify each of the foregoing individuals that we have removed from our files any reference to the unlawful action against him and that the failure to rehire will not be used against him in any way.

CHAMPION RIVET COMPANY, A DIVISION OF HOGEN INDUSTRIES, INC., A HI TECMETAL GROUP COMPANY

Allen Binstock, Esq., for the General Counsel.
Richard T. Prasse, Esq. and *Amy Berman Hamilton, Esq. (Hahn Loeser & Parks)*, of Cleveland, Ohio, for the Respondents.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based upon a charge filed on January 22, 1992, by Local No. 743, Allied Industrial Workers of America (the Union), which charge was amended by the Union on March 30, April 29, and July 15, 1992, the Regional Director for Region 8 of the National Labor Relations Board (respectively, the Regional Director and the Board), issued a complaint on July 22, 1992, alleging that Champion Rivet Company, a Division of Hogen Industries, Inc., a HI TecMetal Group Company (the Company or Respondent) had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to this complaint denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me at Cleveland, Ohio, on January 28, 1993, at which the Respondent was represented by counsel, and the parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to raise objections and motions, and to argue orally. After the hearing concluded, the Respondent and the General Counsel filed briefs, which have been carefully considered.[1]

Based upon the entire record in this case and upon my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Champion Rivet Company (Champion Rivet) is an Ohio corporation engaged in the manufacture of rivets, cleavage pins, and break pins at its facility in Cleveland, Ohio. Annually, Champion Rivet purchases and receives goods valued at over $50,000 directly from points outside of the State of Ohio. I therefore find that Champion Rivet is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union here, Local No. 743, International Union of Allied

[1] On April 16, 1993, the General Counsel and Respondent filed a joint motion to correct the record. Those corrections comport with my recollection of the testimony, and the requested changes in exhibit numbers are consistent with my notes on those exhibits. The motion is granted, and the record has been amended by noting and correcting transcript errors.

Industrial Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Champion Rivet Company, one of the named respondents here, had been for some years a part of a corporation named Champion Commercial Industries, Inc. (Commercial). Champion Rivet operated first in Cleveland, then moved to East Chicago, Indiana, then moved back to Cleveland in April 1990. Commercial operated three divisions, Champion Rivet, which manufactured rivets, an induction plant, which heat treated metals, and a manufacturing division, which manufactured machined metal products.

All of the units of Champion Commercial were experiencing financial troubles in the early nineties. In November 1990, Commercial's vice president announced to employees that the Company was running out of money and would be forced to close by the end of the year. At about the same time another company, HI TecMetal Group (TecMetal), agreed to buy Commercial's induction division. In connection with this sale, there was a meeting between Vince Botta, president of Commercial; Dave Chrysler, vice president; Brian Adams, personnel director; Terry Profughi, president of TecMetal; and Donald M. Chadwick, president of Local 743, which at that time represented Commercial's employees.[2] In the course of the discussion, Profughi stated that he wanted to buy the induction plant from Commercial; that he owned 12 plants, all nonunion, that he wanted to be able to move employees around from plant to plant, but he couldn't do this if there was a union in the plant he was purchasing. He said his purchase of the induction plant ''would be a lot easier if there was no union.'' Chadwick said he would recommend that the Union drop its representation (of the employees working at the induction plant) if Profughi promised to keep the ''old timers'' working at the induction plant. Profughi agreed, and the deal went through.[3]

Commercial's manufacturing facility shut down in January 1991, and several employees from the division were transferred to Champion Rivet. These included Chadwick, who had worked for the Company since 1962, Frank Gallardo, who had 28 years' service, and John Abron (spelled, in the record, Abrom, or Abram, or Abrams) with 20 years.

At this time, according to Plant Manager Janos Szigeti Champion Rivet was using 32,000 square feet of a complex of 198,000 square feet, a ramshackle structure that flooded every time it rained.

B. *The Sale of Champion Rivet*

Financial woes continued to plague Champion Rivet. The result was that the Company was sold to TecMetal. There were problems with the sale itself, but, on reaching tentative agreement, Hogen Industries (a division of TecMetal) and Champion Rivet agreed on August 23, 1991 (memorialized by a written agreement dated August 29, 1991), to hand over management of the business of Champion Rivet to Hogen as of August 23.

On or about this date, Vince Botta held a meeting of all employees in the office of Champion Rivet and announced that the operation would cease ''due to funds.'' It was generally known, according to Chadwick, that the Company was being sold to TecMetal. Chadwick asked Janos Szigeti, then materials manager for Champion Rivet, if he could talk to Terry Profughi for 5 minutes. Szigeti said no, that Terry did not want to talk to him. Chadwick then addressed the meeting and said that if they could talk keep their jobs he would recommend that they not fight the elimination of the Union. The plant closed, and all employees were laid off.

After this meeting, there was another meeting in the induction division building, across a parking lot from the rivet division. Clayton Frazier, a 14-year employee of Champion Commercial, testified that, sometime after the shutdown of Champion Rivet, Supervisor Rick Huffman told him there was going to be a meeting to set a date to make applications to return to work. Six employees were invited to the meeting[4] with Profughi and Brian Adams. Profughi talked to these employees, telling them to report to TecMetal's headquarters for a physical, interviews, and orientation. Frazier returned to work at the old Champion Rivet location on August 29. The others, except for Ken Huffman, who had a problem with the physical examination, reported to work at that time or shortly thereafter.

C. *Requests to Bargain*

A few weeks after the plant reopened, Chadwick, Gallardo, and Abron found out about it and contacted the Union's Regional Director, Donald C. Wagner. Wagner wrote to Brian Adams at Hogen Industries on October 2 and requested bargaining. Michael Robinson, general manager at Hogen, replied, on October 9, 1991, denying that Hogen had acquired the assets of Champion Rivet. This was technically true, since the assets were not acquired until October 29, but, I think, evades the question about the Union's request to bargain. Wagner tried another tack. On October 17 he addressed a ''To Whom It May Concern'' letter to Champion Rivet, requesting bargaining. This caught the attention of Hogen, and on October 22, Robinson posted a notice on the Champion Rivet building, on Champion Rivet stationery, to all employees, saying that they had received the October 17 letter informing the employees that the Company had to bargain with the Union ''unless the (successor) company had a good faith doubt or proof that the Union has lost majority support among the employees.''

If the Company's desires were not clear enough, the notice went on to ask ''what can a company base its doubt on? The National Labor Relations Board recognizes that employees may act together or individually by petition to the Company stating their wish not to be represented by the Union. If a majority so act, the National Labor Relations Board has found that the company has a good faith doubt.''

Not surprisingly, a petition was circulated among the employees and signed by the five transferees from the old Champion Rivet. Armed with this assurance, Brian Adams wrote Wagner on October 28 stating that even if the present

[2] The Union had represented Commercial's employee's from some time in 1963.

[3] Apparently this promise was kept, because there is nothing further in this record about employees at the induction plant.

[4] Frazier, McArthur Bishop, Bruce Campbell, Nicholas Szilpal, Ron Tokay, and Ken Huffman.

Employer was found to be a successor, ''there is a good faith doubt or proof that the Union lacks the majority support of our employees.''

D. *Stipulations, Withdrawals, and Admissions*

Prior to and during the course of the hearing, the parties entered into several stipulations, the General Counsel withdrew some complaint allegations, and the Respondent made certain admissions, all of which served to narrow the issues before us.

1. Stipulations

(a) The complaint alleged that a unit appropriate for collective bargaining in this case was: ''all production and maintenance employees and truck drivers of the employer's Cleveland, Ohio operations, excluding office, clerical employees, and professional employees, guards and supervisors as defined in the Act.''

Having first denied this allegation in its answer, the Respondent stipulated with the General Counsel and the Union that this is an appropriate unit.

(b) Having first denied that Hogen and TecMetal were successors to Champion Commercial, the Respondent stipulated that they are successors to Champion Commercial and that they are a business successor to Champion Commercial, the parent of Champion Rivet, within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Based upon this stipulation, I find that the present Champion Rivet Company is a division of Hogen Industries, Inc., itself a HI TecMetal Group Company, and that these entities are a single employer within the meaning of the Act.

(c) The parties stipulated that the letters dated October 2 and 17, 1991, are the only requests for recognition made by the Union, and that the Respondent refused to recognize the Union, in a letter dated October 25, 1991, based upon the employees' petition.

(d) The parties stipulated that Champion Commercial, the parent of Champion Rivet, laid off its entire work force as of August 22, 1991. Whereupon Hogen Industries entered into a management agreement which allowed them to manage the assets of Champion Rivet, hiring its own employees, who happened to be former employees of Champion Rivet. During the time period from August to October there were negotiations and culmination of the asset purchase. Those employees continued as Hogen employees after the asset purchase. Two supervisory employees, Janos Szigeti, materials manager, and General Operations Manager Rich Huffman. Other executives took other positions with Hogen or TecMetal, or went elsewhere.

2. Withdrawals

At the opening of the hearing, the General Counsel moved to withdraw the allegations contained in paragraph 12 of the complaint; that the Respondent unilaterally changed terms and conditions of employment for unit employees on and after October 29, 1991, without notice to the Union. There was no objection to this motion, and I granted it, removing paragraph 12 from the issues in this case.

3. Admissions

(a) During the hearing, the Respondent amended its answer to admit paragraph 9, alleging that James (Janos) Szigeti unlawfully initiated and associated in the circulation of an antiunion petition; and paragraphs 11(A) and (B) which alleges that the Union requested recognition on October 2 and 17, 1991, and that the Respondent has failed and refused to recognize and bargain with the Union. These amendments were not objected to and were allowed.

(b) Also during the hearing, the Respondent moved to withdraw the paragraph in its answer entitled ''Affirmative Defense'' alleging that its refusal to recognize the Union was based upon a good-faith doubt as to the majority status of the Union. This motion, likewise, was not objected to, and was granted.

From an examination of these actions of the parties, the stipulations, withdrawals and admissions, and from the statements of the parties, I find that the Respondent is not contesting refusals to bargain, and that it will accept a bargaining order based on the allegations.

The sole issue which was litigated and is left for me to decide is the question of whether the Respondent unlawfully refused to rehire Donald Chadwick, Frank Gallardo, and John Abron, former employees of Champion Commercial in its Champion Rivet division.

E. *The Failure to Rehire*

Donald Chadwick appeared to me to be a credible witness. Nothing in his testimony was denied or controverted by any other witness and I find that his description of his experience with Champion Commercial and Champion Rivet was as he described it.

Chadwick worked for Champion Commercial for 29 years as of September 1991. As noted above he was president of the Charging Party Union and had held that office for at least 23 of those years.[5]

At Champion Commercial, Chadwick testified that he ran drill presses, acted as cold header helper, was a packer, operated shears, and ran milling machines or broacher, grinders, and stampers. He had never worked in the rivet division before the Commercial operation closed down early in 1991. His work at Champion Commercial was exemplary and is testified to by an undated[6] letter addressed ''to whom it may concern'' from D. J. Chrysler, vice president of manufacturing at Champion Commercial. Chrysler commented on Chadwick's ability in handling ''virtually all the equipment in our secondary machining operations''; his near-perfect attendance record for ''many, many, years''; his fair and hon-

[5] Chadwick's actions in abandoning union representation of employees, other than ''old timers'' in the induction division late in 1990, and his offer to wholly forsake the Union at the meeting in August 1991 concerning the acquisition of Champion Rivet by Hogen are not, perhaps, in the finest traditions of unionism or solidarity, but they do reflect the facts of the nineties, that the Union can no longer protect members' jobs, nor can it stand up in declining industries, to insistent, nonunion employers. But we are not called upon here to sit in judgment on those actions, but rather on the Employer's actions in refusing to rehire Chadwick, Gallardo, and Abron.

[6] Despite this, the letter was received without objection.

est work as a union representative; and his willingness to help his fellow employees.

Frank Gallardo, who also appeared to be a candid and truthful witness, and whose testimony was not denied by any other witness, testified that he started at the rivet division in November 1962 and moved to the manufacturing division in August 1963. He remained there until the division closed in December 1990, then went back to the rivet division. At Commercial's manufacturing division, Gallardo drove a towmotor. He was on the night shift for 13 years, and while he was there served as union steward from 1970 to 1976.

When he came over to the rivet division in late 1990, Gallardo drove a truck and towmotor, unloaded steel, packed rivets, ran the shears, and assisted on the cold header.

John Abron was hired by Commercial in February 1973 and worked in manufacturing until that division was shut down, then went to the rivet division in December 1990. Abron had served the Union as a steward and as committeeman. For the last 3 years of his employment he was the Union's secretary-treasurer. At the manufacturing division Abron was a set-up man on drill presses, roll machines, and grinders. He also did maintenance and machine repair and tool making. When he got to the rivet division he did packing, drove the towmotor and the company truck, operated the shears, and assisted on the hot header machine.

Abron testified that in the period before the rivet division was sold, Rich Huffman, his supervisor, told him he wanted him to be his set-up man in the new operation. Huffman testified here for the Respondent and, while he said that he did not recommend Abron for rehire it was because he was less qualified than Clayton Frazier. Huffman did not deny that he told Abron that he would like to have him for his set-up man in the new operation.

The evidence introduced by Respondent showed that the decisions as to who was to be rehired after Champion Rivet closed down in August 1991, then reopened 3 weeks or so later, were made before the shutdown, and that Rich Huffman made recommendations to Janos Szigeti, based in part as Huffman's own judgments and those of hot header operator McArthur Bishop. Szigeti, in turn passed these recommendations on to Brian Adams, the personnel manager at Hogen, and to Terry Profughi, the head of TecMetal. So when the employees were assembled on August 23 to hear Botta tell them that Champion Rivet had run out of money and was closing down, the structure of the new organization, and staffing, was already set.

The new operation was, to use a current, overworked, expression, ''leaner'' than before. Thus, as testified to by Clayton Frazier, a tool and die maintenance man, there were to be only six employees at the new Champion rivet division of Hogen Industries: Bishop, Frazier, Campbell, Szilpal, Tobay, and Ken Huffman.

McArthur Bishop had run the hot header when the rivet division was located in East Chicago, Indiana, and he moved east with the division at the beginning of 1991, or late in 1990. The hot header operation consists of taking a 30-foot piece of stock, sheared to the required length for the particular job, then heating the pieces to 4000 degrees Fahrenheit, and hitting them with an instrument to form a ''hot'' head. This is a hard, very hot, and physically demanding job. The only person in the Company who could, or can, perform it is Bishop. Plant Manager Szigeti indicated that if Bishop was ill, or on vacation, the hot header was just shut down. The hot header job required a helper, primarily to steady the stock as it goes through the shears. In August 1991, Clayton Frazier was assigned this duty, but he was soon replaced by a former employee, Bob Duke, who himself left soon after being hired.[7]

Cold headers used coils of wire, sheared lengths of wire and headed them cold, without heating. Mike Szilpal and Bruce Campbell operated these machines.

There was a small cold header, used to make a smaller diameter product, and this was run by Ron Tokay.

The sixth employee of the new ''leaner'' Champion Rivet was to be Rick Huffman's son, Ken, but Ken had some problem or other with the physical examination required by Hogen, and he never reported to work. He was to perform general utility work, and to operate the rolling machine, used to remove seams and de-burr finished rivets.

After the operation started, the Company hired Bob Duke, as noted above, and Greg Kilbowski, as a hot header trainee, but Kilbowski only stayed for a week. The Company also hired an employee named Billingsley, who transferred from another division of Hogen, and Gerald Williams. At the time of this hearing, Williams was still working at the Company, primarily doing packing and drilling.

Along with these full-time hires, the Company has used a number of part-time people, some if not all from employment services. The Company has also obtained temporary employees through the Urban League, who were paid through grants arranged by the League.

Szigeti was asked specifically why the Company did not rehire Chadwick, Gallardo, and Abron. He described Chadwick as ''not a productive employee. His work proficiency was quite poor and he lacked the work ethic I required to make Champion Rivet work.'' Gallardo was ''able to drive a forklift. He was not able to pack and the product would come back to be packed again after it was pointed out. He lacked the work ethic.'' Abron ''couldn't adapt. He had a work ethic, but it wasn't—there wasn't a drive there. There wasn't a desire to work with the team and, hey, let's get the job done. You couldn't motive[ate] him to work.''

Elaborating on these characterizations, Szigeti stated that he got anywhere from 900 to 2000 pieces a day from the drill press, but that Chadwick could produce 300 pieces on ''a good day for him.'' When they put Gallardo on the pack line he ''would make up boxes, build a wall of boxes, and he'd be sleeping behind the wall by the pack line. He wouldn't pack. He, for whatever reason, did not want to understand that he needed to pack and pack it correctly and pack what he was told to pack.''

As to Abron, Szigeti testified that he was assigned to the roller, and that he was not capable of the combination required. The machine will process 1000 pieces an hour, but Abron did not feed the pieces into the machine properly, it jammed up and cost the Company $500 to $1000 worth of dies. This happened once, but Szigeti could not remember when, later saying that it was in July 1991.

Szigeti also testified that he knew Chadwick was the union president. He denied that he knew that Gallardo was any-

[7] Duke had been fired, before all this happened, for poor attendance. After returning to work, he again had trouble getting to work and left the Company again.

thing but a member of the Union, and did said that he knew that all of the employees, including Abron, were members of the Union. Szigeti did say that neither Chadwick nor Gallardo worked for Champion Rivet after January 1991, but continued to work for Champion Commercial under President Vince Botta. They were employed in cleaning up the old Commercial area, but Szigeti said that if he or Huffman needed help they would go to Botta and request that Chadwick or Gallardo be sent over to Champion Rivet. This was done, but when Szigeti had complaints about Chadwick's low performance, or Gallardo's sleeping behind a wall of boxes, Botta replied that they were working for him and they would help out at Champion Rivet when he didn't need them. McArthur Bishop, the hot header operator, testified that during 1991 John Abron acted as a helper. Bishop stated that, on Huffman's request, he had Abron do some work on tools and dies. Abron refused to do what Bishop wanted, in the way that he wanted it done. Abron wanted to ''do it his way.'' Bishop spoke to Vince Botta, and to Huffman, and finally Bishop told Huffman that he did not want Abron doing anything else for him. On cross-examination, Bishop said that he had told employees that he didn't ''give a damn for the Union,'' but there was no elaboration on this remark.

Rich Huffman had been a supervisor for Champion Rivet in East Chicago and moved with that operation to Cleveland early in 1991. He continued to supervise the employees of Champion Rivet at Cleveland. Huffman testified that he made recommendations to Szigeti and Vince Botta, for employees to be employed by Hogen Industries. He recommended that Bishop, Frazier, Tobay, Szalpal, Campbell, and his son Ken Huffman be hired for the new Champion rivet division of Hogen.

Huffman stated that he recommended the people who were experienced and who could produce efficiently for the Employer. In Huffman's opinion Chadwick was not qualified to perform any of the jobs they were going to do (in the new operation). Abron was not recommended because his qualifications were ''far lower'' than those of Clayton Frazier, who was recommended. Huffman felt that Gallardo's work performance was ''very unacceptable'' and there was no job that we were hiring that he could perform.'' Huffman knew that Chadwick was the union president, and that Abron held some union office, but he denied that these union positions had any affect in his decisions not to recommend them for rehire.

On cross-examination, Huffman stated that he knew that Champion Rivet had a progressive disciplinary procedure, calling for a progression of verbal warning, written warning, suspension, and discharge. In this connection, the General Counsel asked Huffman if he knew what happened to the personnel records of Champion Commercial. Huffman said he didn't know. The General Counsel and I then had a colloquy on the record about these records. The General Counsel stating that he had asked Champion Rivet for them and that they did not have them. Champion Commercial was out of business. He did not know whether there were any records, or where they were. He did say that Botta was there (in the building), but when I asked if he wanted to put Botta on the witness stand, counsel for the Respondent stated that he wanted to move on, and finish the hearing on that day. The General Counsel did not press the issue and Botta was not called to testify.

I have previously mentioned the testimony of Chadwick, Gallardo, and Abron as to their duties, and what jobs they performed. This testimony was corroborated by Clayton Frazier, who observed their working hours during the January-to-August period. Chadwick did admit on cross-examination that he had done cleanup work, snow removal, and mopping up after leaks, but all of the alleged discriminatees stated that they had done their jobs satisfactorily.

F. *Analysis and Conclusions*

1. The 8(a)(1) and (5) allegations

The parties have stipulated that the Union was the exclusive collective-bargaining representative at all times material herein for employees in the following unit:

> All production and maintenance employees and truck drivers of the Employer's Cleveland, Ohio operations, excluding office, clerical employees, and professional employees, guards and supervisors as defined in the Act.

The parties have further stipulated that Hogen Industries and HI TecMetal Group are successors to Champion Commercial Company within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). As I have found, Champion Rivet, Hogen Industries, Inc., and HI TecMetal Group are a single employer within the meaning of the Act.

The parties stipulated that, on August 22, 1991, the former Champion Rivet Company, then a division of Champion Commercial Company, laid off its entire work force, and entered into a management agreement whereby Hogen Industries, Inc. would manage the assets of Champion Rivet, hiring its own employees, who happened to be former employees of Champion Rivet.

At the hearing, the Respondent amended its answer to admit that it had unlawfully assisted in the preparation of a petition stating that the employees who signed the petition did not wish to be represented by the Union. The petition was circulated by admitted Supervisor Janos Szigeti (referred to in the complaint as James Szigeti), all of those then employed by Respondent signed it. The Respondent also withdrew its affirmative defense to the complaint, to the effect that Respondent had a good-faith doubt of the Union's majority status.

The parties stipulated that the Union demanded recognition for employees in the above unit on October 2 and 17, 1991, and that the Respondent refused to recognize the Union in a letter dated October 25, 1991, based on the petition which it had prepared and circulated among its employees.

These stipulations and admissions show that the Respondent has violated Section 8(a)(1) of the Act by the initiation, preparation, and circulation of the petition about October 23, 1991, causing its employees to signify their desire not to be represented by the Union; *Bay Area Mack*, 293 NLRB 125 (1989).

On the basis of its admissions that the Union was the statutory collective-bargaining representative of its employees in October 1991, the several named Respondents are a single employer, the successor under *Burns*, supra, to the former

employer Champion Commercial, and by its admission that it refused recognition of the Union on October 25, falsely claiming that it had a good-faith doubt of the Union's majority status in the unit described above, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act.

2. The 8(a)(3) allegations

The General Counsel has established antiunion animus by Respondent through the credible and undenied testimony of Chadwick that Terry Profughi had told a group of management people and employees, in November 1990, that he did not want to have a union in any of his plants. This, in itself, was not alleged as a violation of law and, from the way it was phrased, it seemed to contain no threat nor promise which could have rendered it unlawful, but it does indicate an attitude in opposition to the unionization of Respondent's employees.

This attitude, I find, was put into action by the Respondent's admitted unlawful refusal to bargain, and its fraudulent circulation of an antiunion petition at that time.[8]

I find that the antiunion hostility shown by these incidents, together with the status of Chadwick and Abron as union officers; Respondent's holding of a secret meeting with the six people who were to be offered reemployment, and its failure to notify Chadwick, Gallardo, and Abron either as union officials, who should have been consulted about plans for rehiring and reopening by an admitted single employer, and successor, or as individuals; lead to the conclusion that the General Counsel has established a prima facie case under *Wright Line*.[9]

The Respondent argues that it would have made the same decision about rehiring Chadwick, Gallardo, and Abron despite any union activity by any or all of these employees.

To establish this, the Respondent presented the testimony of Edward M. (Mike) Robinson, general manager of Hogen Industries, Inc., who stated that Champion Rivet was an unprofitable business when Hogen took over in August 1991, and that he ordered Janos Szigeti to hire as few people as possible to get them going, but to get the most qualified. These sentiments are irreproachable in theory, but they were not shown to be based on real levels of pending business, orders in process or prospective orders, or the financial requirements for continued operations. There are no statistical, accounting, or business necessities shown to justify not hiring the discriminatees here.

The testimony of Szigeti likewise fails to convince me that Chadwick, Gallardo, and Abron would not, in any event have been hired. When called as a witness by the General Counsel Szigeti affirmed that he had given an affidavit to the Board in which he stated that the three discriminatees were not qualified for the positions which were filled.[10] Later, as we have recorded above, Szigeti added to their lack of qualifications, a number of deficiencies; Chadwick was too slow, Gallardo built a bunkhouse for himself out of shipping boxes, Abron ruined dies on the roller machine. But, when asked why they were not reprimanded, disciplined, or fired, Szigeti stated that he didn't know about any disciplinary procedures, but that he had gone to Vince Botto to complain about Gallardo and Chadwick, only to be rebuffed by Botto's statement that they worked for him, and could not be fired by Szigeti.

However, Botto, who was present just outside the hearing room (presumably with other sequestered witnesses), was not called by Respondent to corroborate this story. No payrolls were submitted, or other personnel data shown, to establish that Chadwick, Gallardo, and Abron were somehow not employed by Champion Rivet. In fact the evidence shows that they were employed in the rivet division, even though they may have done cleaning or snow removal in other parts of the plant.

I don't think that Szigeti went to Botto, or anyone else, about these employees, even assuming that they had personal shortcomings.[11] Indeed I infer and find that Botto, if he had been called to testify, would have testified contrary to the Respondent's position, and Szigeti's testimony. Rich Huffman also testified about the reasons for not rehiring Chadwick and the others, but he did not corroborate Szigeti. Huffman, said, simply, that the three were not qualified, but gave no reasons for those conclusions.

I would point out, in addition, the fact that Respondent hired numerous full-time and part-time employees after beginning the new operation at Champion Rivet in August 1991. There were no explanations why Chadwick, Gallardo, and Abron were not called to fill these positions.

I therefore find that the Respondent has not presented evidence which is sufficient to over come the prima facie case. I find that Donald Chadwick, Frank Gallardo, and John Abron were not rehired because of their identification with the Union, and in order to keep out the Union, in violation of Section 8(a)(1) and (3) of the Act. *U.S. Marine Corp*., 293 NLRB 669 (1989); *Allegheny Graphics*, 307 NLRB 984 (1992).

THE REMEDY

Having found that the Respondent has engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the Act. I shall recommend that it cease and desist therefrom, and that it take certain affirmative action necessary to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to rehire Donald Chadwick, Frank Gallardo, and John Abron in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to immediately offer them reinstatement to their former positions or, if those positions no longer exist, then to substantially equivalent positions, and make them

[8] I cite this as evidence of Respondent's antiunion motivation even though it occurred almost 2 months after the layoff of Champion Rivet's work force. The testimony by Chadwick, that he asked to talk to Profughi after the August 22 meeting but was refused permission to do so, is not alleged in the complaint as a refusal to bargain, but it is additional evidence, closer to the layoffs, of continuing union animus.

[9] 251 NLRB 1083 (1980); see *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[10] He was not asked, nor did he explain, why these three employees were not even invited to file applications for employment on August 22.

[11] I do credit Bishop's testimony that Abron did not do what Bishop had told him, but there is no evidence that anyone except Bishop, who was not a supervisor, ever spoke to Abron about the problem.

whole for any loss of wages they may have suffered as a result of its discrimination against them, with interest thereon computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. The Respondent, a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to bargain with the Union and by circulating a petition for its employees to disassociate themselves from the Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By refusing to rehire Donald Chadwick, Frank Gallardo, and John Abron, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices found to have been committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]